United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1570

To be argued by
JEFFREY D. ULLMAN

Bpls

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1570

UNITED STATES OF AMERICA,
Appellant,

—v.—

HENRY GOMEZ LONDONO,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA, :

Appellant, :

Dkt. No. 76-1570

-against- :

HENRY GOMEZ LONDONO, :

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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Preliminary Statement

This is an appeal by the United States of America, pursuant to Title 18 United States Code §3731, from an order entered on November 17, 1976, by the United States District Court for the Eastern District of New York (Hon. John F. Dooling, Jr., J.), which granted, after oral argument upon a stipulated record, defendant-appellee Henry

Gomez Londono's motion to suppress evidence. The decision of Judge Dooling has been officially reported at 422 F. Supp. 519 (E.D.N.Y. 1976); the original memorandum and order is reproduced in the Government's Appendix at A-173.

Indictment 76 CR 153 (E.D.N.Y.), filed March 2, 1976, charged defendant Henry Gomez Londono in three counts, with violations of the Bank Secrecy Act (31 U.S.C. §1101(b)), making false, fictitious and fraudulent statements (18 U.S.C. §1001), and transporting a weapon (18 U.S.C. §922(e)).

Gomez Londono timely moved to suppress the statements made, and tangible evidence seized from his person and possessions, on the ground that the statements elicited were the product of an unconstitutionally coercive interrogation, and that the subsequent search of his luggage, pursuant to a warrant, was the tainted "fruit of the poisonous tree." All of the relevant facts necessary to dispose of the motion were agreed upon, in the Court below, by the Government and defendant and were memorialized in a stipulation, reproduced in the Government's Appendix at A-88. On November 17, 1976, by Memorandum and Order, Judge Dooling granted defendant's suppression motion in all respects.

The District Court found that the stipulated facts, far from establishing a violation of either 18 U.S.C. §1001 or 31 U.S.C. §1101(b), affirmatively demonstrated that neither statute had, in fact, been transgressed by the defendant. Concluding that the nature of the interrogation giving rise to Londono's allegedly false statements was inherently and fundamentally unfair, and that no actual violation of the Bank Secrecy Act had been made out, the Court below granted the motion to suppress in its entirety, holding that the affidavit submitted in support of the search warrant, which ultimately disclosed the existence of additional United States currency, and the weapons which were the subject of Count Three of the indictment, was "insufficient in law."

Pursuant to 18 U.S.C. §3731, the Government now appeals so much of the District Court's order that found the affidavit submitted in support of the search warrant to have been legally insufficient. The Government does not challenge the District Court's finding that Gomez Londono violated neither the Bank Secrecy Act (31 U.S.C. §1101(b)), nor the "false statements" clause of 18 U.S.C. §1001. Neither does the Government contest the criteria

employed by Judge Dooling in reaching his determinations on these questions.*

Statement of Facts

The facts are undisputed and were stipulated by the parties in the Court below.

On February 22, 1976, as he neared the Avianca Airlines departure gate at Kennedy International Airport, Henry Gomez Londono was accosted by two plain-clothes United States Customs Agents. The agents, joined shortly thereafter by a uniformed Customs Inspector, two employees of Pan American World Airways (one of whom acted as a Spanish interpreter), and two uniformed Port Authority police officers, proceeded to advise Gomez Londono, for the first time, of the provisions of the Bank Secrecy Act (31 U.S.C. §1101), which require filing a report regarding removal from the United States of currency or monetary instruments in excess of $5,000.

*In its brief, the Government expresses the view that Judge Dooling's conclusion with respect to the reach of 18 U.S.C. §1001 was "erroneous." On the representation, however, that the Solicitor General does not "believe this case an appropriate one to have the issue resolved should the case reach the Supreme Court" (Government's brief at 8), the Government has chosen not to litigate the issue before this Court. While content to rest upon Judge Dooling's determination with respect to this issue, we suggest to the Court that neither United States v. Adler, 380 F.2d 917 (2d Cir. cert. denied, 389 U.S. 1006 (1968), nor United States v. Corr, 543 F.2d

Gomez Londono was asked whether he was taking more than $5,000 out of the United States. Neither advised of any right to remain silent, nor informed that it was perfectly legal to leave the United States with as much United States currency as he wished, nor provided with the appropriate form (Form 4790), with which to declare the amount in excess of $5,000 intended to be transported out of the United States, Gomez Londono, who spoke little English, gave a series of equivocal answers, which were used both to obtain a search warrant for his luggage and as a predicate for the First and Second Counts of the instant indictment.

Initially, Customs agents were directed to the defendant by a reliable Colombian informant with information to the effect that Gomez Londono, fully described by the informant, was an individual who intended to transport $100,000 out of the United States for the purpose of travelling to Colombia to complete a narcotics transaction. When Gomez

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1042 (2d Cir. 1976), has the remotest connection with Judge Dooling's analysis in holding that an indictment charging a violation of 18 U.S.C. §1001 must fail where the facts alleged cannot sustain the Government's burden of establishing that the questions which gave rise to the allegedly offensive answers were part of an interrogation "fair in the circumstances in which it was undertaken and in the light of the purpose of the statute which authorized the inquiry and required the answer." United States v. Gomez Londono, supra, 422 F.Supp. at 525. See United States v. Jacobs, 531 F.2d 87 (2d Cir. 1976), reaffirmed on remand, ____ F.2d ____, Dkt. No. 75-1319 (2d Cir. December 30, 1976).

Londono was identified at the airport by a Pan American Airways employee, and deemed to match the informant's description, Customs agents stopped him, informed him of the provisions of 31 U.S.C. §1101, and proceeded to ask him whether he was transporting more than $5,000 out of the United States. After the question was repeated, Gomez Londono stated that he had only $900, and showed the Customs officers the cash which he had in his pockets (approximately $870).

When asked for the third time, Gomez Londono handed Customs agents an envelope from his jacket pocket, saying that he did not know its contents. The agents, observing something green through an opening in the envelope, proceeded to open it, discovering, among other things, approximately $10,000 in United States currency. Gomez Londono was then arrested. His airline ticket, passport, and baggage claim checks were taken from him. His luggage was removed from the aircraft and stored at the International Arrivals building at Kennedy Airport.

Two days later, on February 24, 1976, a search warrant was issued for the luggage. The affidavit submitted in support of the search warrant is contained in the Government's Appendix at A-95. The facts recited therein contain no further information than that provided above. Upon execution

of the warrant, the agents found, among other things, approximately $45,000 in United States currency and two loaded .38 caliber revolvers.

The District Court's Findings and Opinion

The District Court found, on these undisputed facts, that the defendant had violated neither the Bank Secrecy Act (31 U.S.C. §1101(b)), nor 18 U.S.C. §1001. Confining the reach of 31 U.S.C. §1101(b) to the plain meaning of the words used in the regulations promulgated under its authority, the Court ruled that the obligation to file reports with respect to the export of monetary instruments does not arise until "the time of departure." 31 C.F.R. §103.25(b). The Court below held:

> Gomez Londono never departed the United States, nor was the money ever transported from the United States. Gomez Londono is not charged with an attempt to violate section 1101(b) within the meaning of §1058 [of Title 31], nor does the statute punish attempts. His acts at most constituted a frustrated attempt. Cf. United States v. San Juan, 545 F.2d 314 (2d Cir. 1976).

United States v. Gomez Londono, supra, 422 F.Supp. at 525

Employing the same analysis utilized in suppressing defendant's oral statements at his airport interrogation, the District Court also found that no prosecution of the defendant

could lie under the "false statements" clause of 18 U.S.C. §1001. When the Government relies upon the allegation that false responses were given to an official oral inquiry,"...it must show that the interrogation was fair in the circumstances in which it was undertaken and in the light of the purpose of the statute which authorized the inquiry and required the answer." United States v. Gomez Londono, supra, 522 F.Supp. at 525.

The District Court found the instant interrogation to be manifestly unfair. No one informed the defendant that he was free to leave the United States with as much currency or monetary instrument as he wished; neither was he informed that as of the time of his interrogation he had not yet committed any crime to the knowledge of the agents; nor was the defendant ever tendered Form 4790, that he might properly complete it. As a matter of Due Process, the District Court held, the statements were not fairly obtained, and, thus, the Government could not sustain its initial burden of establishing the fairness of the inquiry that led to the allegation that a violation of 18 U.S.C. §1001 had been committed:

> Gomez Londono should have been tendered a Form 4790 and have been told that he was free to take as much United States currency out of the country

> as he wished, but that he was obliged to report the amount that he was taking, and would then be free to depart with all of the money that he declared. So much was necessary to secure compliance with the [Bank Secrecy] Act and to elicit a response on which the Government could proceed with propriety. Gomez Londono was not a ward of the Government, but when the Government undertakes to interrogate a man in the knowledge that if he gives a truthful answer it will be wholly beneficial to him, and if he gives an untruthful answer he may commit two crimes, due process of law requires that the interrogation be such that the expected or probable result is compliance with law and not the eliciting of a violation of law.
>
> The episode at JFK does not appear as one in which the Government sought information for a statutory purpose in order to secure compliance with the law and was disappointed in its expectation of a candid response.
>
> The result of the transactions at JFK on February 22nd was, then, that the offense of §1001 was not committed.

United States v. Gomez Londono, supra, 422 F.Supp. at 525-526.*

Having thus found the facts insufficient to state an offense under either 31 U.S.C. §1101(b) or 18 U.S.C. §1001, the Court below held that the affidavit submitted in support of the search warrant, which recited a somewhat less complete

*It should also be noted that the statute which mandates the inquiry giving rise to the allegedly false answers, 31 U.S.C. §1101(b), is not one concerned with the making of oral statements, but, rather, with the filing of written reports on the international transportation of monetary instruments.

version of the same facts,* similarly "insufficient in law" to justify the issuance of the search warrant:

> "No one was before the magistrate to suggest the legal problems related to prosecutorial conduct which the very completeness of the affidavit might have disclosed to the magistrate. To say, therefore, that he acted indiscreetly in granting the warrant is impossible. Nevertheless, having reached the foregoing conclusion as to the nature of the defects in counts one and two of the indictment [charging violations, respectively, of 18 U.S.C. §1001 and 31 U.S.C. §1101(b)] it necessarily follows that, practically helpless as the magistrate was to reach the point determined in this Court, the nature of law requires the conclusion that the affidavit supporting the warrant was insufficient in law."

United States v. Gomez Londono, supra, 422 F.Supp at 526.

The Government concedes before this Court that the District Court's findings of fact and conclusion of law regarding the insufficiency of the first two counts of the indictment were correct (Government's brief at 8). The Government thus concedes that, as a matter of law, the facts known to Customs agents at the time of Gomez Londono's arrest, and later pre-

*The affidavit of Special Agent Robert Annunziato, submitted in support of the application for a search warrant, fails to allege that Gomez Londono ever denied having more than $5,000 in his possession. Compare Government's Appendix A-45 with A-97. In addition, the Annunziato affidavit fails to allege that Gomez Londono had not filed the report required by the statute, nor whether any effort had been made to determine whether any other person associated with the transaction had filed the report, thus relieving Londono of any personal obligation to do so. See 31 C.F.R. §§103.23(d); 103.25(b).

sented to a Magistrate in support of a search warrant application, not only failed to establish any transgression of law, but, as Judge Dooling held, affirmatively demonstrated that no crime at all had been committed. Nevertheless, professing to be "at a loss to understand the basis for" Judge Dooling's suppression of the evidence from the luggage search (Government's brief, at 12-13), the Government challenges the propriety of the District Court's ruling that the affidavit submitted in support of the search warrant was "insufficient in law."

ARGUMENT

THE DISTRICT COURT PROPERLY SUPPRESSED THE EVIDENCE SEIZED FROM GOMEZ LONDONO'S LUGGAGE

The Government presses before this Court, for the first time, the novel, if not strange, argument that the instant search warrant properly issued under the authority of 31 U.S.C. §1105, because the warrant application need not demonstrate that "monetary instruments" are being transported in violation of law. According to the Government's position, all that need be demonstrated to justify issuance of a warrant is that probable cause exists for the belief that "monetary instrument" exceeding $5,000 in value are in the process of transportation.

In spite of the fact that the only conduct rendered criminal by the statute is the failure merely to file a report, not the actual transportation of "monetary instruments", the Government contends that the absence of the requisite report, even where, as here, no obligation to file the report had yet arisen, is enough to trigger issuance of a warrant:

> Significantly, §1105 [of Title 31] authorizes the issuance of search warrant where there is probable cause to believe that 'monetary instruments' are in the process of transportation; and Form 4790 'has not been filed.' The statute does not contain the requirement that before a warrant be issued a person have violated §1101 (b). It is enough that the required report has not been completed.
>
> Government's Brief at 11.

This strained and peculiar analysis, however, ignores the plain language of 31 U.S.C. §1105, and renders the Act internally inconsistent. Indeed, the very formulation of the argument itself contains its own rejoinder.

31 U.S.C. §1105 provides in pertinent part:

> If the Secretary [of the Treasury] has reason to believe that monetary instruments are in the process of transportation and with respect to which a report required under §1101 of this title has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Id. (emphasis added).

The Government's argument slides conveniently

over the statutory provision that no application for a search warrant pursuant to §1105 may be made unless a report required by the statute has not been made, or has been made but contains false or fictitious statements.

While the statute does not specify when the report must be filed, regulations promulgated by the Secretary of the Treasury, pursuant to the authority vested in him by the legislation, provide that the appropriate report is required to be filed "at the time of departure ... unless otherwise directed or permitted by the Commissioner of Customs." 31 C.F.R. §103.25(b). Thus, the obligation to file the report does not arise until the time of departure, as the Court below squarely held, and as the Government now concedes. It follows, of course, that, prior to the time of departure, there is no obligation to file a report and hence no report is yet "required" within the meaning of the Act and §1105. If no report is "required", of course, then, the criteria of §1105 are not met, and no search warrant properly may issue.

In the instant case, as the parties now agree, Gomez Londono was arrested prior to the "time of departure", and was, thus, as of the time of his arrest, not yet obligated to file a report. Under these circumstances,

then, the requirements of §1105 could not be met by the affidavit submitted to the Magistrate, and a search warrant could not properly issue.

Certainly, it would be anomalous, to say the least, to find, as the Government suggests, that a search warrant could issue under circumstances where the facts affirmatively establish there has been no violation of law; that is, where no report was filed because the defendant was arrested before the obligation to file the report arose.

Under the Government's analysis, a search warrant could then issue where there is no offense to prosecute; a state of affairs which leads to the wholly absurd conclusion that an individual who has committed no offense, and as to whom the facts in the public domain establish no offense, could nonetheless be subjected to the intrusion of a non-consensual search of his personal possessions, when the expected results of the search constitute neither evidence of the commission of a crime, nor contraband, nor property designed, or intended, for use, or which is, or has been, used as the means of committing a criminal offense. Cf. Fed.R.Crim.P. Rule 41(b).

Indeed, if the Government is correct, monetary instruments seized pursuant to such a warrant would be subject to forfeiture, in spite of the conceded lack of criminal activity on the part of their possessor, and in spite of the fact that the Act was not intended to make the mere transportation of any amount of monetary instruments a crime per se.

31 U.S.C. §1102, providing for the seizure and forfeiture of currency transported in violation of the Act, sets forth the criteria for forfeiture in language which parallels §1105:

> Any monetary instruments which are in the process of any transportation with respect to which any report required to be filed under section 1101(a) of this title either has not been filed or contains material omissions or misstatements are subject to seizure and forfeiture to the United States.
>
> 31 U.S.C. §1102(a) (emphasis added).

Since §1105 and §1102 were enacted together as part of the same statutory scheme, they should be read in pari materia. Thus, if the Government is correct in its analysis regarding §1105, the same analysis should apply to §1102. Accordingly, assuming, arguendo, the validity of the Government's position, money seized pursuant to a warrant which issues before the obligation of

filing accrues, may not only be searched for, but seized, and forfeited as well, and a citizen who has violated no law may, thus, have his property taken from him. Unless the logic of our law is made to run in reverse, the Government's analysis cannot withstand critical review.

Indeed, the regulations promulgated pursuant to the Secretary of the Treasury's authority shed some light on this issue. 31 C.F.R. §103.48, which purports to explain the forfeiture statute, 31 U.S.C. §1102, states that currency or other monetary instruments are subject to forfeiture only if the "report [provided for in 31 U.S.C. §1101 and 31 C.F.R. §103.25] has not been filed as required by [31 C.F.R.] §103.25 ..." Id. 31 C.F.R. §103.25, in turn, provides, in pertinent part, that the report required by the Act need not be filed until "the time of departure".

Although 31 C.F.R. §103.50, pertaining to 31 U.S.C. §1105, does not specifically refer to 31 C.F.R. §103.25, certainly it would be anomalous, in the extreme, to suppose that money which may be lawfully searched for pursuant to a warrant, because the requisite report has not been filed, may, nevertheless, not be forfeited because no obligation to file had yet accrued. On the Government's analysis, one is left to wonder what point there is in

searching, pursuant to a warrant, for that which may neither be seized, forfeited, used as evidence, nor otherwise retained by the Government.

Research discloses that, thus far, no Court has heretofore been called upon to apply the patina of judicial construction upon §1105. Were analogies necessary, however, reference may be had to those cases where the affidavit submitted in support of a search warrant fails to allege facts which constitute probable cause to believe that a federal, as opposed to state, crime has been committed. See United States v. Brouilette, 478 F.2d 1171 (5th Cir. 1973); United States v. Birrell, 242 F.Supp. 191, 201 (S.D.N.Y. 1965); Tripodi v. Morgenthau, 213 F.Supp. 735, 738 (S.D.N.Y. 1962); cf. Thomas v. United States, 376 F.2d 564 (5th Cir. 1967). It perforce follows that a warrant may not properly issue where the affidavit fails not only to establish the commission of any offense at all, but affirmatively demonstrates, as a matter of law, that no crime, in fact, has been committed.

All of the above, of course, is bottomed on the premise that each and every allegation contained in the Annunziato affidavit was properly before the Magistrate

for his consideration. However, Judge Dooling directed the suppression of the oral statements made by Gomez Londono at the time of his airport interrogation. Such statements, of course, may not be made the basis for the issuance of a search warrant. See, e.g., Wong Sun v. United States, 371 U.S. 471 (1963); United States v. Capra, 501 F.2d 267, 280 n.12 (2d Cir. 1974); United States v. Nelson, 459 F.2d 884, 889 (6th Cir. 1972); United States v. Sterling, 369 F.2d 799, 802 (3d Cir. 1966); United States v. Epstein, 240 F.Supp. 80 (S.D.N.Y. 1965).

The Government, again, professes to be "at a loss to understand the basis for" Judge Dooling's holding that the statements made, and the money obtained, from Henry Gomez Londono on February 22 should be suppressed. Pointing out that the District Court has no power, "absent a constitutional violation, to suppress otherwise voluntary statements" (Government's brief, at 14 n.4), the Government contends that Judge Dooling's order of suppression, in this respect, was incorrect.

The simple answer is that Judge Dooling squarely, specifically, and unambiguously held the product of the airport confrontation to be the fruits of an unconstitutional interrogation. The Court found that the interrogation was

fundamentally unfair, for reasons set forth, supra, and thus, that Gomez Londono's oral responses were obtained in violation of the due process clause of the Fifth Amendment. The Court held:

> Gomez Londono was not a ward of the Government but when the Government undertakes to interrogate a man in the knowledge that if he gives a truthful answer it will be wholly beneficial to him, and if he gives an untruthful answer he may commit two crimes, due process of law requires that the interrogation be such that the expected or probable result is compliance with law and not the eliciting of a violation of law.
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> The episode at JFK does not appear as one in which the Government sought information for a statutory purpose in order to secure compliance with the law and was disappointed in its expectation of candid response.
>
> United States v. Gomez Londono, supra, 422 F.Supp. at 525-526.

There is nothing novel about this application of the due process clause to the confrontation between Government and private individuals. In United States v. Jacobs, supra, this Court affirmed the dismissal of those counts of an indictment charging perjury where the defendant had not been advised, prior to her grand jury appearance, that she was the target of an investigation, in derogation of the usual practice of the United States Attorneys in this Circuit. In the present case, the issue is not whether specific warnings had to be given to the defendant, but,

rather, as in Jacobs, what fundamental fairness requires under the facts and circumstances of the case. The Court below correctly found the defendant's airport interrogation to have been unfair, and, thus, properly suppressed the fruits of that interrogation.

Conclusion

The order appealed from should be affirmed.

Dated: New York, New York
February 16, 1977

Respectfully submitted,

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C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No. 76-1570

UNITED STATES OF AMERICA,

Appellant, ~~Plaintiff~~

against

HENRY GOMEZ LONDONO,

Defendant - APPELLEE

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at
400 C.P.W., NEW YORK, N.Y. 10025.

That on FEBRUARY 16, 19 77, deponent served the annexed
APPELLEE'S BRIEF
on DAVID G. TRAGER, U.S. ATTORNY (E.D.N.Y.)
attorney(s) for APPELLANT
in this action at 225 CADMAN PLAZA EAST, BROOKLYN, N.Y. 11201
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me
Feb. 16, 1977
Barbara C Holley
BARBARA C. HOLLEY
NOTARY PUBLIC, State of New York
No. 31-1836740
Qualified in New York County
Commission Expires March 30, 1977

Edward M. Chikofsky
The name signed must be printed beneath
EDWARD M. CHIKOFSKY

C 321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on 19 *deponent served the annexed*

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law